

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-052407

03/25/2016

HONORABLE JOHN R. HANNAH JR

CLERK OF THE COURT
W. Tenoever
Deputy

JOHN MOTTA

BETH K FINDSEN

v.

FLAGSTAR BANK

DENNIS L DANIELS

JUDGMENT SIGNED

Before the Court is defendant Flagstar's Application for Attorneys' Fees and Costs. The Court has considered the application, response and reply and all associated filings, and the record in this case. This order serves as the findings and conclusions requested by plaintiff Motta pursuant to Civil Rule 52(a).

The defendant is entitled to recover as taxable costs pursuant to A.R.S. section 12-341 those expenses listed in its Statement of Costs, except the fees paid to the State Bar of Arizona for the *pro hac vice* admission of counsel. The latter are not recoverable as costs because they are not among the items listed in A.R.S. section 12-332. See Ahwatukee Custom Estates Management Ass'n, Inc. v. Bach, 193 Ariz. 401, 973 P.2d 106, ¶ 6 (1999).

IT IS THEREFORE ORDERED awarding defendant Flagstar its taxable costs in the amount of \$2,562.04.

The defendant is not entitled to an award of attorneys' fees, pursuant to either the loan documents or A.R.S. section 12-341.01(A).

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The note and the deed of trust provide for recovery of attorneys' fees only in limited circumstances. The note says that the "Note Holder" is entitled to reimbursement of attorneys' fees incurred "in enforcing this Note." Similarly, the deed of trust says the "Lender" is entitled to collect fees "incurred in pursuing the remedies provided" for breach of the borrower's obligations.

In this litigation Flagstar was not enforcing the note or exercising its remedies arising from Mr. Motta's default under the deed of trust. The (non-judicial) enforcement process was over before this litigation began. The provisions of the note and deed of trust relating to attorneys' fees therefore do not apply.

Though the loan documents do not provide for a fee award in this case, they do not preclude an award either. Fees may be awarded under section 12-341.01 unless an award would be inconsistent with an express contractual provision governing recovery of attorneys' fees. Jordan v. Burgbacher, 180 Ariz. 221, 883 P.2d 458, 465-66 (App. 1994). An award here would not be inconsistent with the fee provisions of the note and deed of trust.

The question, then, is whether this was an "action arising out of contract" within the meaning of A.R.S. section 12-341.01(a). To answer this question a court must look to the nature of the action and the surrounding circumstances, as opposed to the labels placed on the claims by the parties. Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc., 198 Ariz. 10, 6 P.3d 315, ¶ 21 (App. 2000).

The fact that a contract exists somewhere in the transaction is not enough to support a fee award. An action does not arise out of contract when the contract does no more than place the parties in a relationship in which the law then imposes duties recognized by public policy. Dooley v. O'Brien, 226 Ariz. 149, 244 P.3d 586, ¶ 10 (App. 2010). When the duty allegedly breached is one implied by law based on the parties' relationship, as opposed to an obligation that would not exist but for a promise in the contract, the claim sounds in tort not contract. Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc., 6 P.3d 315, ¶¶ 20-27. Similarly, the statute does not apply to a "purely statutory" cause of action in which a contract is peripherally involved. Kennedy v. Linda Brock Auto. Plaza, Inc., 175 Ariz. 323, 856 P.2d 1201, 1203 (App. 1993).

Motta's claims for negligent misrepresentation (Count One of the Amended Complaint), violations of the Arizona Consumer Fraud Act (Count Two), and for the most part his wrongful foreclosure claim (Count Five), were based on the allegation that Flagstar induced or at least encouraged Motta to stop paying on his loan, promised him that it would modify the loan if he accepted Flagstar's offer to participate in the "Trial Payment Plan," and then foreclosed before

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the time for accepting the offer had expired. Motta claimed that the alleged conduct was tortious (Counts One and Five) and in violation of a consumer protection statute (Count Two).

The tort and consumer fraud claims did not “arise out of” the contracts between Motta and his lender. The contracts were the backdrop for the claims, not their focus. The obligations allegedly breached by Flagstar arose by operation of law. Flagstar would have had the same duties to Motta even if (or, from Motta’s point of view, despite the fact that) Flagstar was not a party to the original loan agreement or a successor in interest to the lender.

Motta’s other claims – to set aside the trustee’s sale for lack of authority (Count Three) and for false recordings in violation of A.R.S. section 33-420 (Count Four), and to a lesser extent the wrongful foreclosure claim (Count Five) – grew out of the fact that the Flagstar acted in the name of MERS without (allegedly) disclosing that Freddie Mac was the true beneficial owner of Motta’s obligation. Motta asserted that Flagstar violated the Arizona statutes regarding deeds of trust, as well as the false recording statute, by proceeding as it did.

The Court finds that the claims based on non-compliance with the deed-of-trust statutes also did not arise “out of contract” within the meaning of section 12-341.01(a). Though Motta alleged that Flagstar breached certain provisions of the deed of trust, those allegations were not the focus of the claims or even a necessary element. The contract was mostly just the factual predicate for the claims. That is why Flagstar was successful in raising a statutory defense based on A.R.S. section 33-811(c).

IT IS THEREFORE ORDERED Flagstar’s application for attorneys’ fees is denied.

LET THE RECORD REFLECT entry of final judgment consistent with this order.